

Letter of Findings: 04-20120165
Sales and Use Tax
For Tax Year 2008, 2009, and 2010

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ISSUE

I. Sales and Use Tax – Imposition.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-4-1; IC § 6-2.5-4-4; IC § 6-8.1-5-1; IC § 6-8.1-5-4; [45 IAC 2.2-3-20](#); [45 IAC 2.2-4-8](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Rhoads v. Indiana Dep't of State Revenue, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); USAir, Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466 (Ind. Tax Ct. 1993); Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974); Sales Tax Information Bulletin 41 (December 2002); Sales Tax Information Bulletin 41 (September 2010).

Taxpayer protests the assessments of use tax on the purchases of tangible personal property.

STATEMENT OF FACTS

Taxpayer is an Indiana company, which provides customers/guests furnished accommodation. In 2011, the Indiana Department of Revenue ("Department") conducted a sales/use tax audit of Taxpayer's records. Pursuant to the audit, the Department determined that Taxpayer failed to pay sales tax or self-assess use tax on tangible personal property it purchased and used in the course of its business activities, including items listed in Taxpayer's depreciation schedule. The audit also determined that Taxpayer did not properly collect sales tax on its rentals of the furnished accommodation, namely hotel rooms. As a result, the Department assessed additional sales tax, use tax, and interest.

Taxpayer protested the Department's assessments. An administrative hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales and Use Tax – Imposition.

DISCUSSION

The Department's audit assessed additional sales tax on the grounds that Taxpayer did not properly collect and remit sales tax to the Department on its rentals of the hotel rooms. The Department's audit also assessed use tax on Taxpayer's purchases of tangible personal property, which included items listed in Taxpayer's depreciation schedule. Taxpayer did not maintain adequate records to show that the sales/use taxes on its purchases were paid.

Taxpayer, to the contrary, claimed that it was not responsible for collecting sales tax on the rentals of hotel rooms because its customers/guests stayed more than thirty days. Taxpayer further submitted additional documentation to demonstrate that it was not responsible for the sales/use tax on its purchases of items used in the course of its business activities.

As a threshold issue, all tax assessments are prima facie evidence that the Department's assessment of tax is presumed correct. "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Indiana Dep't. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012).

IC § 6-8.1-5-4(a) further provides:

Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. **The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks. (Emphasis added).**

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A person who acquires property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). Indiana also imposes a complementary excise tax called the "use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). "Use" means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a). The use tax is functionally equivalent to the sales tax. See Rhoads v. Indiana Dep't of State Revenue, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002).

By complementing the sales tax, the use tax ensures that non-exempt retail transactions (particularly out-of-state retail transactions) that escape sales tax liability are nevertheless taxed. Id.; USAir, Inc. v. Indiana

Dep't of State Revenue, 623 N.E.2d 466, 468–69 (Ind. Tax Ct. 1993). The use tax ensures that, after such goods arrive in Indiana, the retail purchasers of the goods bear their fair share of the tax burden. To trigger imposition of Indiana's use tax, tangible personal property must (as a threshold matter) be acquired in a retail transaction. Id. A taxable retail transaction occurs when (1) a party acquires tangible personal property as part of its ordinary business for the purpose of reselling the property; (2) that property is then exchanged between parties for consideration; and (3) the property is used in Indiana. See IC § 6-2.5-1-2; IC § 6-2.5-4-1(b), (c); IC § 6-2.5-3-2(a). Nonetheless, if the property used in Indiana "was acquired in a retail transaction in Indiana and the state gross retail tax has been paid on the acquisition of that property," the property is "exempt from the use tax." IC § 6-2.5-3-4(a)(1). There are other exemptions available for sales/use tax. IC § 6-2.5-5-1 et seq. A statute which provides a tax exemption, however, is strictly construed against the taxpayer. Indiana Dep't. of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). "[W]here such an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law." Id. at 101.

A. Sales Tax.

The Department's audit determined that Taxpayer failed to collect sales tax on the rentals of hotel rooms where its customers/guests either (1) stayed less than thirty days, or (2) in the aggregate stayed more than thirty days but were billed and paid weekly or bi-weekly. Taxpayer, to the contrary, claimed that it was not responsible for collecting the sales tax on some of those guests because they stayed more than 30 days.

IC § 6-2.5-4-4, in relevant part, provides:

- (a) A person is a retail merchant making a retail transaction when the person rents or furnishes rooms, lodgings, or other accommodations, such as booths, display spaces, banquet facilities, and cubicles or spaces used for adult relaxation, massage, modeling, dancing, or other entertainment to another person:
- (1) if those rooms, lodgings, or accommodations are rented or furnished for periods of less than thirty (30) days; and
 - (2) if the rooms, lodgings, and accommodations are located in a hotel, motel, inn, tourist camp, tourist cabin, gymnasium, hall, coliseum, or other place, where rooms, lodgings, or accommodations are regularly furnished for consideration.

(b) Each rental or furnishing by a retail merchant under subsection (a) is a separate unitary transaction regardless of whether consideration is paid to an independent contractor or directly to the retail merchant.

(c) For purposes of this section, "consideration" includes a membership fee charged to a customer.

[45 IAC 2.2-4-8](#) states:

- (a) For the purpose of the state gross retail tax and use tax: Every person engaged in the business of renting or furnishing for periods of less than thirty (30) days any accommodation including booths, display spaces and banquet facilities, in any place where accommodations are regularly furnished for a consideration is a retail merchant making retail transactions in respect thereto and the gross income received therefrom shall constitute gross retail income from retail unitary transactions.
- (b) In general, the gross receipts from renting or furnishing accommodations are taxable. An accommodation which is rented for a period of thirty (30) days or more is not subject to the gross retail tax.
- (c) There is no exemption for purchases made by persons who are engaged in renting or furnishing accommodations. Such persons are deemed to purchase or otherwise acquire tangible personal property for use or consumption in the regular course of their business.
- (d) The renting or furnishing of an accommodation for less than thirty (30) days constitutes a retail merchant making a retail transaction. Every person so engaged must collect the gross retail tax on the gross receipts from such transactions. The tax is borne by the person or organization who uses the accommodation.
- (e) The tax is imposed on the gross receipts from "furnishing" an accommodation. The gross receipts subject to tax include the amount which represents consideration for the rendition of those services which are essential to the furnishing of the accommodation, and those services which are regularly provided in furnishing the accommodation. Such amounts are subject to tax even when they are separately itemized on the statement or invoice.
- (f) The tax is imposed on the gross receipts from accommodations which are furnished for periods of less than thirty (30) days.

The Department's Sales Tax Information Bulletin 41 (December 2002), 26 Ind. Reg. 928 ("Information Bulletin 41"), and the subsequently revised Information Bulletin 41 (September 2010), 20100929 Ind. Reg. 045100600NRA, which addresses issues concerning "Sales Tax Application to Furnishing of Accommodations," further illustrates, in relevant part, that:

III. Exemption of Tax

An accommodation that is rented for thirty (30) days or more is not subject to the sales tax. **The customer is required to pay the tax for the first thirty (30) days if the customer is billed on less than a monthly basis.**

EXAMPLE:

A business rents accommodations for its employees and signs a lease for four months, payable monthly,

the first thirty (30) days would not be subject to tax. Same situation as above; however, the business pays the rental on a weekly basis. The business is required to pay sales tax on the first thirty (30) days of rental. If an entity rents the rooms for employees, the entity is renting the rooms and not the person who stays in the room. The contract would not have to be for a specific room as long as the continuous stay portion of the contract remains in effect. **(Emphasis added).**

In this instance, Taxpayer claimed that it was not responsible for the sales tax because its customers/guests stayed more than 30 days. Taxpayer also submitted copies of the hotel invoices to support its protest.

Taxpayer's documentation demonstrated that six (6) guests stayed more than 30 days. Thus, the Department agrees that Taxpayer is not responsible for the sales tax on the following transactions listed in the Audit Summary, Page 13, pursuant to the above mentioned statute, regulation, and Sales Tax Information Bulletin 41.

| Guest Name | Rate per Night | Additional Taxable Sales |
|------------|----------------|--------------------------|
| Josh M. | \$30 | \$300 |
| Hunter I. | \$30 | \$360 |
| Randy W. | \$30 | \$510 |
| Mike L. | \$30 | \$330 |
| Mark B. | \$30 | \$390 |
| William P. | \$35 | \$945 |

In short, Taxpayer's documentation demonstrated that it was not responsible for the sales tax of the above mentioned six guests. Taxpayer, however, remains responsible for the sales tax on the remainder of its guests' stays listed in the Audit Summary. The Department will recalculate Taxpayer's tax liability in a supplemental audit.

B. Use Tax.

The Department's audit assessed Taxpayer use tax on certain purchases, including "Decorative Throws," "Modem," "Speaker phone," "Carpeting," "Van," "Phone System," "TV's," and "Landscaping." Taxpayer claimed that the Department's audit erroneously assessed use tax on those purchases.

IC § 6-2.5-2-1 provides:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

IC § 6-2.5-3-2(a) states:

An excise tax, known as the use tax, is imposed on the **storage, use, or consumption of tangible personal property in Indiana** if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction. **(Emphasis added).**

IC § 6-2.5-3-4 provides:

- (a) The storage, use, and consumption of tangible personal property in Indiana is exempt from the use tax if:
 - (1) the property was acquired in a retail transaction in Indiana and the state gross retail tax has been paid on the acquisition of that property; or
 - (2) the property was acquired in a transaction that is wholly or partially exempt from the state gross retail tax under any part of [IC 6-2.5-5](#), except [IC 6-2.5-5-24](#)(b), and the property is being used, stored, or consumed for the purpose for which it was exempted.
- (b) If a person issues a state gross retail or use tax exemption certificate for the acquisition of tangible personal property and subsequently uses, stores, or consumes that property for a nonexempt purpose, then the person shall pay the use tax.

[45 IAC 2.2-3-20](#) further illustrates:

All purchases of tangible personal property which are delivered to the purchaser for storage, use, or consumption in the state of Indiana are subject to the use tax. The use tax must be collected by the seller if he is a retail merchant described in Reg. 6-2.5-3-6(b)(010) [[45 IAC 2.2-3-19](#)] or if he has Departmental permission to collect the tax. If the seller is not required to collect the tax or fails to collect the tax when required to do so, the purchaser must remit the use tax directly to the Indiana Department of Revenue.

In this instance, Taxpayer believed that the Department's audit erroneously assessed use tax on its purchases because its former employee failed to provide copies of the invoices to the auditor during the audit. Thus, Taxpayer believed that once it provided the copies of the invoices, it would not be responsible for the use tax.

Taxpayer is mistaken. First, Taxpayer's documentation demonstrates that no sales tax was paid on its purchases of "Decorative Throws," "Modem," "Speaker phone," "Carpeting," "Van," and "Phone System." As mentioned above, a taxpayer is liable for use tax when the taxpayer purchases tangible personal property and uses/stores/consumes the property in Indiana without paying sales tax. In this instance, Taxpayer did not pay sales tax at the time of the purchases and it used these items in Indiana. Since sales tax was not paid at the time of the purchases, use tax is due. Thus, the Department properly imposed use tax on those items.

Taxpayer also submitted copies of purchase receipts from various retail stores, such as Lowe's, Home Depot,

Sam's Club, and Walmart, to support its protest of the audit's assessment on "Landscaping" and "TV's." Taxpayer's documentation, however, failed to support its assertion that it paid the sales tax on "Landscaping" and "TV's" which were listed in its depreciation schedule. For example, Taxpayer's depreciation schedule stated that "Landscaping" was purchased on June 1, 2009, for \$3,000. Taxpayer's receipts demonstrated that it paid sales tax on various purchases, including "extension cords," "char. grill," "roofing," "fileset," and "soap dish," at various retail stores on different dates other than June 1, 2009. Similarly, Taxpayer's receipts showed that it purchased various televisions on different dates other than May 1, 2009 and also failed to support its purchase of the \$4,000 "TV's" listed in its depreciation schedule. Thus, given the totality of the circumstances, in the absence of other supporting documentation, the Department is not able to agree that Taxpayer has met its burden demonstrating that the Department's assessment is not correct.

In short, Taxpayer's protest is respectfully denied.

FINDING

Taxpayer's protest is sustained in part and denied in part. Taxpayer's protest of imposition of sales tax (Part A) is sustained on the six guests' stays. However, Taxpayer's protest of the imposition of use tax (Part B) is respectfully denied. The Department will recalculate Taxpayer's tax liability in a supplemental audit.

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